In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-1185

FRANKLIN L. McNULTY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

WILLIAM L. OSTERHOUDT,
STEPHEN J. HEISER,
SINGER & OSTERHOUDT,
1201 Grosvenor Plaza
San Francisco, California 94102
Telephone: (415) 621-0862

JOSEPH H. STEPHENS,
428 - 13th Street
Oakland, California 94612
Telephone: (415) 836-1860

Attorneys for Petitioner Franklin L. McNulty.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner Franklin L. McNulty petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming a judgment of conviction for felony tax evasion entered in the United States District Court for the Northern District of California.

OPINIONS BELOW

No opinions were rendered by the Honorable Luther W. Youngdahl, United States District Judge

for the District of Columbia, visiting in the United States District Court for the Northern District of California. The opinion of the United States Court of Appeals for the Ninth Circuit, entered on January 21, 1976 and as yet unreported, is printed in the appendix hereto as Appendix A.

JURISDICTION

The date of the judgment sought to be reviewed, and the time of its entry was January 21, 1976. This petition is filed within thirty days of said judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether repeated voluntary disclosure to Internal Revenue Officers of substantial Irish Sweepstakes winnings precludes a felony conviction for attempted evasion of a tax assessment in violation of 26 U.S.C. § 7201.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."

2. 26 U.S.C. § 7201 provides in pertinent part:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony . . ."

3. 26 U.S.C. § 7203 provides in pertinent part:

> "Any person required under this title or by the regulations made under authority thereof to make a return . . . who willfully fails to pay such estimated tax or tax [or] make such return . . . shall . . . be guilty of a misdemeanor . . ."

4. 26 U.S.C. § 6020 provides:

> "(a) Preparation of return by Secretary—If any person shall fail to make a return required by this title or by regulations prescribed thereunder, but shall consent to disclose all information necessary for the preparation thereof, then, and in that case, the Secretary or his delegate may prepare such return, which, being signed by such person, may be received by the Secretary or his delegate as the return of such person.
>
> (b) Execution of return by Secretary—
>
> (1) Authority of Secretary to execute return—If any person fails to make any return (other than a declaration of estimated tax required under section 6015 or 6016) required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary or his delegate shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.

(2) Status of returns—Any return so made and subscribed by the Secretary or his delegate shall be prima facie good and sufficient for all legal purposes."

5. 26 U.S.C. § 6201 provides in pertinent part:

"(a) Authority of Secretary or delegate—The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

* * *

(1) Taxes shown on return—The Secretary or his delegate shall assess all taxes determined by the taxpayer or by the Secretary or his delegate as to which returns or lists are made under this title."

6. 26 U.S.C. § 6203 provides:

"The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary or his delegate in accordance with rules or regulations prescribed by the Secretary or his delegate. Upon request of the taxpayer, the Secretary or his delegate shall furnish the taxpayer a copy of the record of the assessment."

STATEMENT OF THE CASE

Petitioner won $128,410.00 on the 1973 running of the Irish Hospitals Sweepstakes. Shortly after learning of his good fortune, he made three or four visits to a local office of the Internal Revenue Service to verify his belief that the prize money was not subject to taxation unless and until it was brought into the United States (Tr. 54-55).[1] On each occasion he was informed that the winnings were taxable and that the approximate tax due would be $75,000.00.[2] One IRS agent testified that he had no difficulty remembering his conversation with petitioner because in his many years with the IRS he had never known anyone to have winnings in the neighborhood of $100,000.00 (Tr. 21).

Petitioner also sought the advice of an attorney who informed him that the winnings were taxable whether or not they were brought into the United States. Despite the attorney's advice that the IRS agents were correct, the petitioner refused to pay, stating that "It's too much. I don't want to pay it" (Tr. 57).

In early June 1973 petitioner borrowed funds from the neighbor who had sold him the Sweepstakes ticket (and who had also accompanied him on his visits to the IRS), and flew with the neighbor to Ireland to collect his prize. Both men then traveled from Ireland to St. Helier in the Channel Islands, where petitioner

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[1] "Tr." refers to the one-volume transcript of the trial held March 17-19, 1975.

[2] Petitioner's actual liability was proved by the government at trial to be $35,014.00 (Tr. 112-113).

deposited some $125,000.00 in the Midland Bank, which is prohibited by local law from disclosing account information (Tr. 59, 149, 175).[3]

Petitioner was indicted on January 29, 1975, for willfully attempting to evade and defeat both the tax on the Sweepstakes prize and the payment of the tax, in violation of 21 U.S.C. § 7201.[4] The government ultimately submitted the case to the jury only on the theory of evasion of the tax, and conceded on appeal that petitioner had not been convicted for evasion of payment of the tax.

At the conclusion of the evidence petitioner's counsel moved for a judgment of acquittal. Whether by misstatement or mistake, counsel's first words in support of the motion were to the effect that the indictment charged basically a misdemeanor. The prosecutor immediately interrupted, and engaged the court in a colloquy in which the court was informed that the only issue before the court on the motion for judgment of acquittal was whether the affirmative act necessary to convert misdemeanor failure to file a return into felony tax evasion had been proved. The court replied that the government had "got it here," and denied the motion (Tr. 228).

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[3]With the exception of $3,000 repaid to the neighbor, $3,000 brought back in traveler's checks, and some $24,000 later used for legal fees, the money remains in the Channel Islands.

[4]Both this Court and the Court of Appeals for the Ninth Circuit have held that attempted evasion of the *assessment* of a tax is a different offense than attempted evasion of the *payment* of a tax although both offenses are proscribed by § 7201. See *Sansone v. United States*, 380 U.S. 343, 354 (1955); *Cohen v. United States*, 297 F.2d 760, 770 (C.A. 9, 1962).

During final argument petitioner's counsel specifically urged the court and jury that petitioner should not be convicted for attempted tax evasion by failing to file a return and concealing income, because there could be no concealment of income which already had been disclosed. Counsel argued further that concealment of location of the assets derived from the income was irrelevant to the question of whether or not the income itself had been concealed (Tr. 243). The prosecutor argued in response that petitioner should be convicted for violating his obligation to pay a tax. The argument that petitioner's crime stemmed from his not *paying* the tax due was made 33 times; the prosecutor made no mention whatsoever of any act by petitioner to conceal the fact that he had won the prize (Tr. 229-38; 245-48).

The Court of Appeals affirmed. Although the opinion suggests that the only issue preserved for review was the assertion by petitioner's trial counsel that the indictment charged "basically a misdemeanor," the court went on to consider petitioner's argument on its merits.[5] It held that petitioner's foreign deposit was sufficient to establish an *attempt* to conceal his income. With respect to petitioner's argument that this deposit could not be such an attempt, under the controlling decisions of this Court, in view of his voluntary disclosures to the IRS, the Court of Ap-

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[5]Petitioner's argument that the government failed to prove an attempt to conceal his winnings was preserved for review. The issue was, in fact, articulated by the prosecutor during argument on the motion for judgment of acquittal, and the trial court's attention was focused directly on it.

peals ruled that these disclosures constituted "active deception going under the guise of honest disclosure."

Jurisdiction of the court of first instance, the United States District Court for the Northern District of California, was predicated on Title 18, United States Code, § 3231.

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE CONTROLLING DECISION OF THIS COURT CONCERNING AN IMPORTANT FEDERAL QUESTION

In *Spies v. United States,* 317 U.S. 492 (1943), this Court considered the difference between a misdemeanor, willful failure to file a return or pay a tax when due under 26 U.S.C. § 7203, and the felony of willfully attempting to evade or defeat a tax under 26 U.S.C. § 7201. The difference, the court held, is that the felony proscribed by § 7201 requires "some willful *commission* in addition to the willful *omissions* that make up the list of misdemeanors" (emphasis added). 317 U.S. at 497. In so holding the *Spies* court rejected the government's contention that willful failure to file a return together with a willful failure to pay the tax is enough to satisfy this standard. Instead, it required that, in addition to a willful though passive neglect of the statutory duty to file and pay, there must exist a willful and positive attempt to evade or defeat the tax by some means "the likely effect of which would be to mislead or conceal." 317 U.S. at 499.

While the court in *Spies* explicitly declined to define or limit the methods by which the willful and positive *attempt* necessary to constitute felony tax evasion might be accomplished,[6] it did make clear that the word "attempt," in this tax law context, is *not* used in the common law sense of that term. 317 U.S. at 498-99. At common law, a criminal attempt refers to conduct which would, but for frustration, result in more serious crime. As used in § 7201, the *Spies* court concluded, "attempt" means any *"act the likely effect of which is to conceal income."* 317 U.S. at 499 (emphasis added).

It is on precisely this point—the meaning of "attempt" as used in § 7201—that the court below departed radically from the explicit holding of *Spies.* For the court found in petitioner's deposit of his winnings, in a foreign bank under strict non-disclosure laws, a "willful attempt to conceal and thus to evade." In so finding the court ignored the significance of petitioner's repeated disclosures to the IRS of the amount of his winnings.[7] If, as *Spies* makes clear,

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[6]The court recognized that the legislative history of §§ 7201 and 7203 contains nothing helpful on the distinction between misdemeanor failure to file or pay, on the one hand, and felony attempt to defeat or evade, on the other, and concluded that Congress may have declined to specify what acts constitute a felony attempt out of concern that such an effort might result in some unintended limitation. 317 U.S. at 499.

[7]The court's treatment of the disclosure question appears almost an afterthought, and is totally unsatisfactory. Petitioner is frankly nonplused by the statement that "[the disclosure] goes under the guise of honest disclosure, but in truth is based on active deception." Petitioner either disclosed or deceived, and all the undisputed evidence is that he disclosed. There is no "guise" involved.

"attempt" in this context means conduct "the likely effect of which is to conceal income," then it is equally clear that petitioner's foreign deposit, coming on the heels of his voluntary disclosures, could not be such an attempt. Once petitioner freely and accurately advised the IRS of his winnings, no conduct on his part would have the likely effect of concealing those winnings from the government, for the quite obvious reason that the government had already been apprised of them.[8]

In view of his disclosures, the location of petitioner's winnings was irrelevant to the ability of the IRS to assess his tax liability. Indeed, §§ 6020, 6201 and 6203 of Title 26, United States Code, specifically authorize the director of the IRS to file returns and assess tax liability where sufficient disclosures are made. Nothing in petitioner's conduct could have frustrated the IRS in assessing his liability. The location of McNulty's winnings was, of course, highly relevant to the collection of his tax liability. As we have noted, however, it is conceded that the government did not prove evasion of payment of the tax, and

[8]It is vital to distinguish, as the Court of Appeals apparently did not, between the two *separate* offenses included within § 7201: willful attempt to defeat or evade *assessment* of a tax, and willful attempt to defeat or evade *payment* of the tax. See *Sansone v. United States, supra; Cohen v. United States, supra.* While the indictment here apparently charged both violations, the government failed to prove an essential element of the latter, namely, that a valid assessment had been made. *United States v. England,* 347 F.2d 425, 430 (7th Cir. 1965); *United States v. Swarthout,* 420 F.2d 831, 833-35 (6th Cir. 1970). Thus, as the government conceded on appeal, petitioner's conviction does not embrace the offense of attempting to defeat or evade payment of the tax.

petitioner was not convicted of that offense. He was convicted *only* of a willful attempt to evade or defeat the tax, and this conviction cannot stand in view of his repeated voluntary disclosures to the IRS.

Although the opinion is rather brief, the court below apparently felt that, since petitioner put his winnings in a foreign bank with non-disclosure provisions in an effort to put the money beyond the acquisitive reach of the tax collector, he was "attempting" to evade the tax. Thus, the court, in direct contradiction of *Spies,* ascribed to the term "attempt" its common law meaning. Had the court, following *Spies,* read "attempt" to mean conduct likely to conceal the income, it would have recognized that petitioner's voluntary disclosures precluded his foreign deposit, or any other subsequent conduct, from having this effect.

In large part, both petitioner's conviction and its affirmance may well rest upon the popular notion that "tax evasion" means not paying a tax. There is no question that petitioner McNulty did not pay the tax, and that he did not intend to do so. As we have emphasized, however, more than this is required where the defendant is charged with attempting to defeat or evade assessment of the tax. The prosecution must prove conduct likely to conceal the income in question. This it did not do. In holding otherwise the Court of Appeals has not abided by this Court's decision in *Spies,* and a writ of certiorari should issue.

CONCLUSION

For the foregoing reasons petitioner respectfully urges that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the judgment of that court.

Dated, San Francisco, California,
February 18, 1976.

Respectfully submitted,
WILLIAM L. OSTERHOUDT,
STEPHEN J. HEISER,
SINGER & OSTERHOUDT,
JOSEPH H. STEPHENS,
Attorneys for Petitioner
Franklin L. McNulty.

(Appendix A Follows)

APPENDIX A

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 75-1949

United States of America,	Appellee,
vs.	
Franklin L. McNulty,	Appellant.

[January 21, 1976]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: KOELSCH and CHOY, Circuit Judges,
and ANDERSON,* District Judge.

ANDERSON, District Judge:

Appellant, an Irish Hospital Sweepstakes winner, set for himself and successfully navigated a firm course leading to the shoals and rocks of a guilty verdict.

*Honorable J. Blaine Anderson, United States District Judge, District of Idaho, sitting by designation.

Prosecution was under a single count indictment charging appellant with willfully attempting to evade and defeat a tax on income received during 1973, and the payment thereof by concealing or attempting to conceal his true income, in violation of 26 U.S.C. 7201.[1] The conviction is affirmed.

In March of 1973 McNulty was advised of his good fortune and confided in several friends that he did not intend to pay any income tax on his winnings. On three occasions McNulty consulted I.R.S. personnel with regard to his tax liability on estimated winnings of $130,000.00. On each occasion he was advised of the approximate tax liability and that leaving the money in Ireland would not eliminate his accountability and the tax. In late May, 1973, McNulty traveled to Ireland, picked up his winnings and then stopped at St. Helier in the Channel Islands and deposited approximately $125,000.00 and brought $3,000.00 back with him to the United States. Prior to and at the time of the deposit McNulty knew that the Channel Islands had strict laws forbidding disclosure of deposits made by citizens of the United States and this included non-disclosure to the I.R.S. McNulty did not file a return or pay a tax on his winnings. The return and payment were due April 15, 1974.

[1] "§ 7201. *Attempt to evade or defeat tax.*
Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

In spite of warnings and advice from three lower echelon I.R.S. representatives, his own attorney, and several friends, received at varying times as his voyage progressed, McNulty devised and pursued his course of action.

McNulty attempts to raise a number of issues on appeal, none of which were presented in the district court and reserved for appellate review. We have carefully examined the entire record and find no exceptional circumstances justifying invocation of the "plain error" rule. Rule 52(b), Fed. Rules Cr. Proc., *United States v. Sheley,* 447 F. 2d 455 (9th Cir. 1971), *cert. denied,* 404 U.S. 1022 (1972). In point of fact and law, there is no error.

The only point preserved for review in this Court is appellant's assertion that the indictment "charges basically a misdemeanor." The indictment in apt and sufficient language charges the felony proscribed by 26 U.S.C. 7201. It charges with particularity the times, the amounts, and the method and manner by which McNulty sought to "willfully and knowingly attempt to evade and defeat said income tax . . . , and the payment thereof, by failing to make such individual income tax return, . . . and by failing to pay [the tax] . . . and by concealing and attempting to conceal from . . . officers of the United States his true and correct taxable income for the calendar year 1973." McNulty relies on *Spies v. United States,* 317 U.S. 492, 498-500, 63 S. Ct. 364, 87 L. Ed. 418 (1943). There is more here than in *Spies.* In the present case the appellant did not file a return or pay a tax and

also made the foreign deposit with full knowledge of the strict non-disclosure laws. At the very least, there was a willful *attempt* to conceal and thus to evade. There was sufficient allegation and proof of some affirmative act rather than only the mere omission to file and to pay. *United States v. Spies, supra.* The jury was fully and correctly instructed in this regard. McNulty did not object to the instructions as given and made no request for an instruction on the misdemeanor as a lesser included offense, 26 U.S.C. 7203.[2]

McNulty's argument that disclosure of his winnings to lower echelon I.R.S. employees completely destroys the concealment or attempted concealment is specious and totally without merit on the facts here. It goes under the guise of honest disclosure, but in truth is based on active deception.

AFFIRMED.

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[2] "§ 7203. *Willful failure to file return, supply information, or pay tax.*

Any person required under this title to pay any estimated tax or tax, or required by this or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

No. 75-1185

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OCTOBER TERM, 1975

FRANKLIN L. McNULTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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No. 75-1185

FRANKLIN L. McNULTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner's sole contention is that he was improperly convicted of willfully attempting to evade his income tax on Irish Sweepstakes winnings, because he voluntarily disclosed the winnings to representatives of the Internal Revenue Service.

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of willfully attempting to evade and defeat the assessment of his 1973 income tax, in violation of 26 U.S.C. 7201. He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. i-iv).

The pertinent facts are as follows: Early in 1973, petitioner won $130,000 in the Irish Sweepstakes (Pet. App. ii). When he learned of his good fortune he stated to a friend that he was not going to tell anyone because

he "wasn't going to pay income tax" (Tr. 30).[1] However, the next day the local newspaper reported that petitioner was a major winner of the Sweepstakes (Tr. 31), and that evening there was a television broadcast to the same effect. Petitioner then consulted representatives of the Internal Revenue Service about his winnings; they advised him that they were taxable even if not brought into the United States (Tr. 20-23, 55; Pet. App. ii). These conversations took place about a year before petitioner's 1973 income tax return was due to be filed. There was no evidence that petitioner identified himself to these employees of the Internal Revenue Service.

In May 1973, petitioner went to Ireland, picked up his winnings, and then stopped at St. Helier, Isle of Jersey, Channel Islands, where he deposited approximately $125,000 in a bank (Pet. App. ii). At that time, petitioner knew that the Channel Islands had strict laws forbidding disclosure of deposits made by citizens of the United States and that those laws forbade disclosure even to the Internal Revenue Service (*ibid.*). Petitioner filed no federal income tax return for 1973, nor did he pay any part of his income tax liability for that year (Tr. 25-28).

Petitioner argues (Pet. 8-11) that he could not have committed an affirmative act of attempted tax evasion because he had already apprised representatives of the Internal Revenue Service of his winnings. But there is no evidence that petitioner identified himself to the Service representatives. Moreover, the conversations in question took place about a year before the 1973 tax return was even due to be filed, and with representatives whose sole duty was to answer questions submitted

[1] "Tr." refers to the trial transcript.

by the public. Indeed, the Service representatives told petitioner that his winnings were taxable, a fact that demonstrates petitioner's willfulness. Finally, even if petitioner had identified himself to revenue agents and told them that he had won the Sweepstakes, these disclosures would not be proof of a subsequent innocent state of mind when petitioner deposited his winnings in a secret bank account in the Channel Islands and failed to file a tax return.

Contrary to petitioner's argument (Pet. 8-9, 11), the decision below does not conflict with *Spies* v. *United States,* 317 U.S. 492. In *Spies* the Court stated: "By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from * * * concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal" (317 U.S. at 499). It is apparent that petitioner's conduct in depositing his winnings in the bank at St. Helier in the Channel Islands was not only conduct the likely effect of which was to conceal, but amounted to "concealment of assets or covering up sources of income"—precisely the type of conduct from which this Court said an affirmative willful attempt to evade a tax might be inferred. Far from being in conflict with *Spies,* the case at bar is in full harmony with it, and indeed is governed by it. Although the vast majority of violations of 26 U.S.C. 7201 are committed by filing false returns, the language of the statute (which proscribes tax evasion "in any manner") is clearly broad enough to include other acts committed for the purpose of concealing unreported income. *United States* v. *Beacon Brass Co.* 344 U.S. 43, 45-46.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

DOJ-1976-04